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No. 88-1434

In the Supreme Court of the United States

OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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TABLE OF AUTHORITIES

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The question presented in this case is whether the Office of Management and Budget's (OMB's) review of agency information collection activities, conducted pursuant to the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, applies to the Department of Labor's hazard communication standard. As our petition explains, this Court's review is warranted because: (1) the court of appeals' decision, which would nullify OMB's authority to examine a wide range of essentially indistinguishable agency activities, poses an important question (Pet. 17-19); (2) the court's decision is incorrect (*id.* at 19-27); and, (3) the court's reasoning is inconsistent with another court of appeals' decision addressing OMB's responsibilities under the PRA's predecessor statute (*id.* at 27-28). In short, this case presents a textbook example of the type of question that warrants this Court's review. Neither the United Steel-

workers' uncommonly derisive brief in opposition (USWA Opp.), nor Public Citizen's supplemental submission (P.C. Opp.), presents any persuasive ground for denying our petition.

1. Respondents first contend that this case does not warrant review because it arises from an "idiosyncratic proceeding" (USWA Opp. 11) in which respondents convinced the court of appeals to manage, under threat of contempt sanctions, the Secretary of Labor's promulgation of a hazard communication standard. We agree that the court of appeals' actions in this case are "idiosyncratic," but that fact strengthens, rather than diminishes, the need for this Court's review. The court of appeals' decision, which threatens a Cabinet officer with contempt sanctions for *complying* with OMB regulations, is the type of departure "from the accepted and usual course of judicial proceedings" that argues in favor of, rather than against, the grant of a petition for a writ of certiorari. See Sup. Ct. R. 17.1(a).[1]

Respondents mistakenly contend that the court of appeals' decision here rests "*primarily*" on the court's construction of its own prior orders and "only *secondarily*" on the court's "views concerning OMB's authority under the PRA" (USWA Opp. 11 (emphasis in original)). See also P.C. Opp. 2-4. Contrary to respondents' arguments, these are not "alternative" (USWA Opp. 11) or "entirely

[1] Public Citizen also contends (P.C. Opp. 4-8) that there is no need for this Court to correct the court of appeals' erroneous construction of the PRA because OMB may be able to accomplish the PRA's objectives through other non-statutory means. Public Citizen is simply taking issue with *Congress's* judgment that the PRA's *mandatory* requirements are necessary to reduce the public's paperwork burdens. In any event, Public Citizen's assertion that OMB's other powers provide appropriate alternatives to PRA review is not accurate.

separate" (P.C. Opp. 2) grounds. The court ruled that the Secretary of Labor had violated its prior orders because she withdrew portions of the newly promulgated hazard communication standard *in response to* OMB's "attempt to exceed its statutory authority" (Pet. App. 13a). Thus, the court's conclusion that the Secretary had violated the prior orders was *based on* the court's construction of the PRA. Indeed, if, as respondents suggest, the court had intended to rescind the Secretary's withdrawal *regardless* of whether it believed that OMB acted within its authority—a truly extraordinary result even in this "idiosyncratic" case—the court would have had no need to discuss OMB's authority at all.

Respondents further contend that the question involved here will not arise in the future because OMB normally conducts its review before the agency promulgates a final rule, the agency then has an opportunity to respond, and OMB may disapprove the final rule "if [OMB] finds * * * that the agency's response to [its] comments * * * was unreasonable" (44 U.S.C. 3504(h)(5)(C)). See USWA Opp. 11-12. Respondents assert that since this process permits the reconciliation of any disagreement between the agency and OMB, "[i]n the ordinary situation, then, the provisions of the PRA itself would have prevented the OMB/OSHA clash that gave rise to a need for a judicial resolution" (*id.* at 12).[2] Respondents fail to recognize, however, that the court of appeals' decision invalidated OMB's authority to take even the very *first* step of the PRA process—the court held that OMB had no authority to review the disapproved provisions. If OMB has no

[2] In this case, the rulemaking did not proceed along the "normal course" (USWA Opp. 11) because *respondents* convinced the court of appeals to order the immediate promulgation of a final rule. See Pet. 11-13.

authority to review agency regulations such as those presented here, then the subsequent steps are irrelevant. Respondents' argument simply underscores one of the reasons why this Court's review is warranted. Moreover, respondents' prediction that this issue will not arise in the future is unrealistic.[3] Indeed, the District of Columbia Circuit reached an inconsistent result in *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449 (`988), under the PRA's predecessor statute, and a petition for a writ of certiorari is presently pending before this Court in that case (No. 88-849). See Pet. 27-28.[4]

2. Respondents defend the court of appeals' conclusion that OMB had no authority to review the disapproved portions of the hazard communication standard because the provisions do not involve "information collection requests" (USWA Opp. 16-18 & n.9). Respondents contend, even more emphatically than the court of appeals, that the provisions "essentially require employers 'not to *compile*, but simply to *transmit* information' " (*id.* at 16, quoting Pet. App. 9a (emphasis added by respondents)). As our petition explains (at 22-23 n.11), that distinction is inaccurate. It is also beside the point. The PRA and OMB's regulations define an "information collection request" to include, inter alia, a "reporting or recordkeeping requirement" (44 U.S.C. 3502(11) (1982 & Supp. IV 1986); see 5 C.F.R. 1320.7(c), (r) and (s)), and all three disapproved provisions impose, inter alia, recordkeeping and reporting requirements. See Pet. 22-24. Those provisions were therefore subject to PRA review.[5]

[3] Even in the "normal course" of rulemaking, OMB may disapprove all or part of a final rule if it concludes that the agency's response to OMB's objections is unreasonable or if the final rule contains objectionable new requirements. See 44 U.S.C. 3504(h)(5). Thus, the prospect of interagency reconciliation would not necessarily prevent recurrence of the issue presented here.

[4] As we explained in our petition (at 19, 28), the court of appeals' novel decision in this case will undoubtedly encourage parties to challenge OMB's authority in other nationwide rulemakings since parties can raise such challenges in the federal circuit of their choice – and may therefore direct future cases to the Third Circuit.

3. Although the court of appeals devoted most of its discussion to whether the disapproved provisions of the hazard communication standard are "collection of information" requirements subject to PRA review (Pet. App. 8a-11a), respondents defend the court's decision primarily on an alternative ground, cited by the court of appeals as having "reinforced" (*id.* at 11a) its conclusion. Respondents contend (USWA Opp. 13) that the PRA provisions stating that OMB shall exercise its authority "consistent with applicable law" (44 U.S.C. 3504(a) (1982 & Supp. IV 1986)) and that the PRA shall not "be interpreted as increasing or decreasing the authority of * * * [OMB] * * * with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)) prohibit OMB from disapproving the Labor Department's hazard communication standard.[6]

[5] Respondents, like the court of appeals, do not even acknowledge OMB's regulations on this subject. Respondents incorrectly suggest that OMB has taken the position that "the PRA does not encompass mere transmittal requirements" (USWA Opp. 17-18). OMB regulations expressly provide for review of agency regulations requiring persons "to obtain or compile information for the purpose of disclosure to members of the public" (5 C.F.R. 1320.7(c)(2)). OMB's regulations further specify that "public disclosure of information *originally supplied by the Federal government* to the recipient for the purpose of disclosure to the public is not included within this definition" (*ibid.* (emphasis added)). But that exception does not apply in this case, where the information originates from a chemical manufacturer or the employer.

[6] Public Citizen, which argues that OMB already has ample authority to accomplish the PRA's objectives under other "applicable law" (see P.C. Opp. 4-8), presumably disagrees with this argument.

OMB's disapproval in this case, which required the Department of Labor to provide either a less burdensome means of accomplishing its substantive objectives or a reasonable explanation why the disapproved provisions should be retained, is consistent with all applicable law. Although respondents contend that OMB has infringed the Department of Labor's statutory authority (USWA Opp. 14-16), the Department has always acknowledged that the hazard communication standard is subject to PRA review. Furthermore, as we explained in our petition (at 24-25), the PRA is quite explicit in allowing OMB to review the kinds of information collection activities that an agency chooses to adopt to accomplish its "substantive" policies. Indeed, respondents' contention that OMB lacks authority to review the agency's " 'objectives' *and* 'methods' " (USWA Opp. 13 (emphasis in original)) would significantly drain the PRA of any meaning. Under respondents' theory, OMB would have no authority to engage in meaningful PRA review of *any* information collection request. For example, respondents' theory *might* permit OMB to review the color or typeface of the Internal Revenue Service's income tax return forms, but OMB could no longer examine whether the IRS's reporting and recordkeeping requirements are "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). Respondents' position, which is manifestly inconsistent with the PRA's language and objectives, simply highlights the need for this Court's review.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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